

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VICENTE A. GUTIERREZ,

Plaintiff,

15 Civ. 3181 (RWS)

- against -

OPINION

CAROLYN W. COLVIN, ACTING COMMISSIONER
OF SOCIAL SECURITY,

Defendant.

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A P P E A R A N C E S:

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Sweet, D.J.

Commissioner of Social Security Carolyn W. Colvin (the "Commissioner" or "Defendant") has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) dismissing the complaint of Plaintiff Vicente A. Gutierrez (the "Plaintiff" or "Gutierrez"), which seeks to reverse the decision of the Commissioner that Plaintiff was not entitled to Social Security Disability ("SSD") and Supplementary Security Income ("SSI") disability benefits. Plaintiff has cross-moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). As set forth below, the Commissioner's motion is denied, the Plaintiff's cross-motion is granted, and the case is remanded to the Social Security Agency for factual determination.

I. Prior Proceedings

On May 18, 2012, Plaintiff filed applications for SSD and disability insurance benefits ("DIB"). Transcript of Administrative Record at 245-60 ("Tr."). On July 30, 2012 the Social Security Administration ("SSA") denied the applications. Id. at 156. Plaintiff filed a request for a hearing before an Administrative Law Judge ("ALJ"). Id. at 95. A hearing was held

before ALJ Eric Borda on December 10, 2013. Id. ALJ Borda considered the case *de novo* and concluded that Plaintiff had not been under a disability within the meaning of the Act from the date of his claimed onset through the date of the decision. Id. The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review on April 6, 2015. Id. at 1. Plaintiff commenced this action on April 20, 2015 to vacate the Commissioner's decision.

Oral argument on the instant motions was held on March 24, 2016, at which time the motions were deemed fully submitted.

II. Administrative Record

Plaintiff's medical record is extensive. The following facts, drawn from the administrative record and filings, provide a very brief summary of the record of Plaintiff's visits to Lincoln Medical and Mental Health Center between December 27, 2011 and November 2013. They are not in material dispute.

Gutierrez was born in 1961. He obtained a GED and soldering training, and from 1987 through November 4, 2011, he worked as a fabric cutter eight hours a day, five days a week. He reported that the job was physical, including lifting and carrying 50

pounds or more frequently, and up to 100 pounds or more. He stopped working on November 4, 2011, testifying later that he did not feel well enough to work.

On December 27, 2011, Gutierrez first sought treatment at Lincoln Medical and Mental Health Center ("Lincoln") for abdominal pain which he reported had been present for years though had worsened in the three or four days prior. He reported a history of hepatitis C, as well as use of alcohol and cocaine. The examination returned normal, and Plaintiff was referred in February 2012 for primary care treatment related to his hepatitis C. In June 2012, he began interferon treatment of Pegasys and Ribavarin. The side effects returned him to the emergency room with flu like symptoms and headaches. He initially discontinued the interferon treatment, but the treatment was restarted. Thereafter, the flu-like symptoms receded, though the headaches continued.

In February 2012, Gutierrez reported to Lincoln that he desired to stop using drugs. In March 2012, Gutierrez returned for substance abuse treatment, reporting a mildly depressed mood, mild emotionality, severe fatigue and low energy, and mild sleep disturbance. His activity level was described as "completely independent" and referred for treatment.

Gutierrez returned to various clinics and offices at Lincoln multiple times per month (and often multiple times per week) for treatment relating to his hepatitis C, substance abuse, depression, impotence, allergies, and related symptoms. He stopped his previous daily use of alcohol and cocaine in approximately March 2012, having been advised that he could not use either while receiving the interferon treatment for his hepatitis C. The interferon treatment was discontinued on August 24, 2012 due to ischemic cotton wool spots on his retina. A March 12, 2013 ultrasound reveals symptoms consistent with cirrhosis. A June 17, 2013 EDG revealed trace varices, an otherwise asymptomatic dilation of blood vessels creating an elevated risk of rupture.

Plaintiff also received ongoing treatment for depression, including several evaluations, pharmaceutical intervention, and individual and group therapy. The hepatitis C was monitored after the discontinuation of treatment. Throughout, Gutierrez's reported symptoms, diagnoses, and test results remained relatively consistent: moderately active hepatitis C, headaches, impotence, depressed mood accompanied by fatigue, lack of sleep, sadness, feelings of guilt, nausea and lack of appetite. The hepatitis C diagnosis worsened other aspects of Plaintiff's

medical conditions, including his mood and allergies. Nevertheless, Gutierrez was repeatedly evaluated as being able to function on a daily basis, without difficulty communicating, maintaining concentration, and learning and performing tasks until June 2013, when Dr. Valeron noted Gutierrez had difficulties functioning independently, communicating clearly, engaging socially, and holding a job. At times, Gutierrez would report slight improvements or feelings of hope regarding treatment or the prospect of employment. Other times, he would report feelings of hopelessness and overwhelming guilt, and an inability to pursue gainful employment. His social engagement was similarly inconsistent, sometimes reporting isolating himself and other times reporting engaging in weekly church activities and going out.

In late September or early October 2013, Gutierrez fell. Three weeks later, he reported to Lincoln with lumbar spine pain. An X-ray revealed no fractures, but he continued to report pain. In November 2013, Gutierrez was diagnosed with chronic hepatitis C, and Dr. Akinola Fisher attested to complications resulting from cirrhosis of the liver. Dr. Fisher noted Gutierrez was not able to pursue gainful employment. His other conditions remained more or less static: depressive disorder, poly substance abuse in sustained full remission, hepatitis C

with liver cirrhosis and related blood issues, headaches, lower back pain. In November 2014, Gutierrez again underwent treatment for hepatitis C with Sofobivir and Ribavarin. Treatment for his lower back pain in September 2014 by Dr. Ruth Osowsky noted his ongoing conditions and indicated in a review of functional capacity that Gutierrez would be unable to work for at least twelve months. The following month, Dr. Maneliz Alonso advised that Gutierrez was employable with work limitations. A conflicting but undated review by Dr. Alonso declines to make a determination with respect to Gutierrez's ability to work due to lack of sufficient information. Plaintiff's liver condition, hepatitis C, fatigue, blood issues, headaches, insomnia, depression and low back pain continued to be treated through late 2014.

III. Applicable Standards

a. Review of the Commissioner's Decision

In reviewing the Commissioner's decision on an issue of disability insurance benefits, a district court must determine whether the decision is supported by substantial evidence. See 42 U.S.C. § 405(g); Brown v. Apfel, 174 F.3d 59, 61-62 (2d Cir. 1999). Substantial evidence is "more than a mere scintilla."

Richardson v. Perales, 402 U.S. 389, 401 (1971). Rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Brown, 174 F.3d at 62-63. "[T]o determine whether the findings are supported by substantial evidence, the reviewing court is required to examine the entire record, including contradictory evidence and evidence from which conflicting inferences can be drawn." Id. at 62 (quoting Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir. 1983) (per curiam)).

Substantial evidence "is still a very deferential standard of review - even more so than the 'clearly erroneous' standard." Brault v. Commissioner, 683 F.3d 443, 448 (2d Cir. 2012). Under this standard, once an ALJ finds facts, a court can reject those facts "only if a reasonable factfinder would have to conclude otherwise." Id. (quoting Warren v. Shalala, 29 F.3d 1287, 1290 (8th Cir. 1994) (emphasis in the original)).

A court reviewing a denial of Social Security benefits does not review de novo the evidence in the record. Pratts v. Chater, 94 F.3d 34, 37 (2d Cir. 1996); Jones v. Sullivan, 949 F.2d 57, 59 (2d Cir. 1991). If the Commissioner's decision that a claimant is not disabled is supported by substantial evidence

in the record, the court must uphold the decision. See 42 U.S.C. § 405(g); Jones, 949 F.2d at 59.

b. Standard of Disability

In order to establish a disability within the meaning of the Act, a claimant must demonstrate the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d) (1)(A). Under the Act, it is not sufficient that the claimant establish the mere presence of a disease or impairment. Rather, he must show that the disease or impairment has caused functional limitations that preclude him from engaging in any substantial gainful activity. Rivera v. Harris, 623 F.2d 212, 215-16 (2d Cir.1980); Coleman v. Shalala, 895 F.Supp. 50, 53 (S.D.N.Y.1995).

Congress has established the type of evidence necessary to prove the existence of a disabling impairment by defining a physical or mental impairment as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and

laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The statute further provides that an individual will be determined to have a disability "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

To determine disability, the Commissioner uses a five-step sequential evaluation process. 20 C.F.R. § 404.1520. If a finding of disability or non-disability can be made at any point in the sequential analysis, the Commissioner will not review the claim further. 20 C.F.R. § 404.1520(a); Williams v. Apfel, 204 F.3d 48, 48-49 (2d Cir.1999).

At step one, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. 20 C.F.R. § 404.1520(b). If the claimant is not engaged in substantial gainful activity, the analysis moves to step two where the Commissioner considers whether the claimant has a "severe" impairment or combination of impairments that significantly limit his physical or mental ability to do basic

work activities. 20 C.F.R. §§ 404.1520(c), 404.1521; Bowen v. Yuckert, 482 U.S. 137 (1987).

If a severe impairment or combination of impairments is present, at step three the Commissioner considers whether the claimant's impairment meets or equals the criteria in Appendix 1 to 20 C.F.R. Part 404, Subpart P. See 20 C.F.R. § 404.1520(d). If the claimant does not have a listed impairment, the Commissioner will make a finding regarding the claimant's residual functional capacity, i.e., what a claimant can do despite his impairments and related symptoms. 20 C.F.R. §§ 404.1520(e), 404.1545.

The Commissioner then uses the residual functional capacity finding at the fourth and fifth steps of the sequential evaluation. Id. At the fourth step, the Commissioner determines whether the claimant has the residual functional capacity to perform his past relevant work. 20 C.F.R. § 404.1520(f). The claimant bears the burden of proving that he cannot return to his former type of work. See Melville v. Apfel, 198 F.3d 45, 51 (2d Cir.1999). If the claimant is unable to perform any work he has done in the past, the Commissioner considers his residual functional capacity along with his age, education, and past work experience to determine if he can do other substantial gainful

activity in the national economy. 20 C.F.R. § 404.1520(g). If a claimant can do other work, the claim will be denied. Id.

IV. The Commissioner's Determination Was Not Supported by Substantial Evidence and is Remanded

In performing the sequential evaluation of Plaintiff's disability, the ALJ concluded:

(1) Plaintiff was not engaged in substantial gainful activity as of the alleged onset date of November 4, 2011. Tr. at 97.

(2) Plaintiff has severe impairments imposing significant limitations on Plaintiff's ability to perform basic work activities, and had lasted or were expected to last for a continuous period of twelve months. Specifically, hepatitis C, major depressive disorder, and polysubstance abuse in remission. Id.

(3) These impairments do not meet or medically equal the severity of one of the listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. Id. at 97-99.

(4) Plaintiff has the residual functional capacity to perform medium work as defined in 20 C.F.R. §§ 404.1567(c) and 416.967(c), limited to simple and routine tasks, allowing him off task 5% of the workday, without fixed production quotas, without hazardous conditions, involving only occasional

decision making, occasional changes in work setting, occasional interaction with others, and occasional over the shoulder supervision. Id. at 99-102.

(5) Plaintiff is unable to perform past relevant work. Id. at 102.

Plaintiff contests the fourth finding as to his residual functional capacity. He argues that the ALJ's conclusion was "improperly determine [sic], without any basis, that Mr. Gutierrez's fatigue would not preclude medium work." Pl.'s Mem. of Law at 17 ("Pl.'s Br."). Plaintiff concedes that the ALJ "agreed that Mr. Gutierrez experienced fatigue as a result of his liver disease," id., but nevertheless argues that the ALJ's conclusion regarding residual functional capacity at a medium-work capability level was unsupported.

With respect to fatigue resulting from Plaintiff's mental health conditions, ALJ Borda gave "great weight" to Dr. Broska's assessment that "claimant's psychiatric and substance abuse problems do not appear to be significant enough to interfere with the claimant's ability to function on a daily basis." Tr. at 101. The ALJ gave "some weight" to Dr. Valeron's opinion "claimant has marked limitations in his ability to do work-related activities on a regular and continuous basis." Id. The

ALJ did not give it more weight on the basis that "it is inconsistent with the evidence in that it finds marked limitations in functioning. Treatment records demonstrate that the claimant is doing better on medication and his mental status examinations have been largely normal." Id. This conclusion is not cogently supported, as Borda recites that Valeron's assessment "noted that the claimant had no side effects from his medication," and Valeron's assessment was, in itself, a form of mental status examination. Id.

ALJ Borda based his conclusion as to Plaintiff's residual functional capacity meeting the level of medium work primarily on disbelief of Plaintiff's claims. Borda determined:

The claimant's allegations are only partially credible. He states that he has an inability to work, however he attends an adult day care program on a regular basis. In addition, he reported to the consultative examiners that he does household chores, shops, and socializes with others. His medical records indicate that his hepatitis C is an issue, but does not create severe limitations and he has stopped taking the medication that had terrible side effects. His depression symptoms appear to be lessening with medication and therapy, and he seems to be doing well in treatment. Id. at 101-02. This section is the majority of ALJ Borda's explicit analysis of Plaintiff's capacity.

First, the facts the ALJ cites to support his conclusion do not provide substantial evidence for Borda's conclusions; participation in adult day care, socialization, and even daily

care for one's self, without more, are not sufficient facts to conclude an individual is capable of the medium work standard. If Plaintiff attended adult day care but sat down during the length of his stay, this evidence would support a far different conclusion than evidence showing he attended the day care and engaged in physical activities all day. Borda did not address the content of Plaintiff's participation. Likewise, that one socializes with others or cares for themselves is not alone evidence of physical capacity. Socialization can be both active and completely sedentary. Shopping can be time limited, interspersed throughout the day or week, or done by limiting exertion. These facts alone were therefore insufficient to provide a basis to disregard Plaintiff's testimony as to his fatigue. While The ALJ need not ""explicitly [] reconcile every conflicting shred of medical testimony," he must set forth the essential considerations with sufficient specificity to allow the district court to determine the decision was supported by substantial evidence. Mongeur, 722 F.2d at 1040 (2d Cir. 1983) (citing Miles v. Harris, 645 F.2d 122, 124 (2d Cir. 1981)). The ALJ failed to do so.

Second, Borda did not analyze with sufficient specificity whether the effects of fatigue resulting from Plaintiff's liver condition impacted Plaintiff's residual functional capacity. The

ALJ's opinion addresses this issue in two paragraphs: one summarizing Plaintiff's history and considering Dr. Patel's assessment on March 5, 2013, and a second according "great weight" to the opinion of Dr. Revan that "claimant has only mild limitations with walking due to fatigue and a limitation with standing due to headaches." Tr. at 100.

"Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, we determine that he or she can also do sedentary and light work." 20 C.F.R. § 404.1567(c). The difference between medium and light work, which can require "a good deal of walking or standing" or "sitting most of the time with some pushing and pulling of arm or leg controls," id. at § 404.1567(b), is the lifting requirement. Borda did not analyze or at all expound on whether, how, or why the limitations noted by Revan would nevertheless render him capable of medium-work, or incapable of more strenuous work. Borda does not expound on whether Plaintiff's fatigue required a physical limitation or did not interfere with the tasks of medium work. The ALJ's conclusion relies on Dr. Revan's assessment; however, Dr. Revan acknowledged (as did the ALJ) that Plaintiff's fatigue resulted in some physical limitation. Those accepted limitations must be set forth with sufficient

specificity to determine whether they are supported by substantial evidence, not determined in a conclusory fashion without discussion. The ALJ's conclusions are therefore "[un]supported by substantial evidence such that additional analysis would be unnecessary or superfluous." McIntyre v. Colvin, 758 F.3d 146, 150 (2d Cir. 2014).

The Commissioner's argument reiterates the inadequate logic that fatigue-based limitations did not preclude medium work as evidence by a lack of limitations in speech, vision, hearing, use of upper extremities, sitting, lying down, personal grooming, or activities of daily living. Def.'s Mem. of Law in Supp. Judg. on the Pleadings ("Def.'s Br.") at 26. While the decision as to whether Plaintiff is precluded or capable of particular work is reserved to the ALJ, the functional limitations must be directly addressed. Failure to expressly consider all the effects of Plaintiff's fatigue on Plaintiff's ability to work renders the analysis incomplete, and the case must be remanded for further proceedings. See Uncapher v. Colvin, No. 02:13-CV-00886, 2014 WL 1316132, at *8 (W.D. Pa. Apr. 1, 2014).

Borda concluded that Plaintiff was not capable of his previous work, and asked the vocational expert to assess an

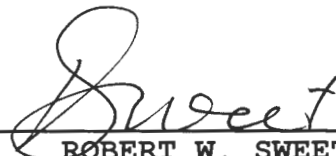
individual capable of medium work and walking for six hours. Tr. 131. Whether Plaintiff is capable of this hypothetical given the fatigue found by the ALJ, must be addressed. "On remand, the ALJ must specifically address the effects of Plaintiff's fatigue on his ability to work. If necessary (i.e., if it is determined that Plaintiff's complaints of fatigue are credible), the ALJ must then accommodate fatigue-related limitations in her RFC assessment and pose a new hypothetical question to a vocational expert." Id.

V. Conclusion

Based on the conclusions set forth above, the Commissioner's motion is denied, the Plaintiff's cross-motion is granted, and the case is remanded to the Social Security Agency for factual determination consistent with this Opinion.

It is so ordered.

New York, NY
July 5, 2016



ROBERT W. SWEET
U.S.D.J.